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Seah Pei Yee v Hap Seng Star Sdn Bhd

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO 22 NCVC-1028–09 OF 2012
YEOH WEE SIAM J
13 FEBRUARY 2013

Civil Procedure — Originating summons — Declaration — Purchase of vehicle — Vehicle contained defects — Unusual noise and/or vibration even when driving at low speed — Service centre unable to identify cause of noise — Request for feedback met with no answers — Application under O 14 r 1 of the Rules of Court 2012 for return of car — Whether matter must be tried through viva voce evidence

The plaintiff had purchased a Mercedes Benz C200 from the defendant at the price of RM80,000. After receiving the car from the defendant, the plaintiff discovered that the car contained defects where there was an unusual noise and/or vibration from the front right part of the car even when she was driving at a slow speed. The plaintiff was only able to use the car for three weeks before it was sent back to the defendant's service centre. The defendant, as at to date, was still unable to identify the cause of the noise. Each time the plaintiff requested a feedback from the defendant, the latter would inform her that it was still identifying the problems and original parts were replaced and no detail was provided to the plaintiff. The plaintiff subsequently commenced the present application under O 14 r 1 of the Rules of Court 2012 ('the ROC') seeking for, inter alia, the return of the car; and payment of RM191,690.97 together with charges of 2.42% annually amounting to RM33,880 and interest of 4.55% as bank charge and any payment and/or penalty that would be imposed by the bank against the plaintiff. The defendant argued that by commencing this writ action, the plaintiff had conceded that this was a matter which must be tried through viva voce evidence.

Held:

(1) In seeking a relief which, inter alia, included a declaratory order, the plaintiff was at liberty to decide whether to commence the action by an originating summons or by a writ of summons. The court had the power to grant the plaintiff's application for summary judgment in a plain and obvious case where the defendant had no defence to the plaintiff's claim. It was clear that the defence was not sustainable and there were no triable issues raised. In the interest of justice, summary judgment ought to be given to the plaintiff without the necessity of a full trial for viva voce evidence (see paras 10–11 & 21).

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(2) The plaintiff did not have to wait for the car to be totally incapacitated and be a total write-off before the plaintiff was entitled to reject the car. By the very fact that the car, a premium car, had gone into the defendant's service centre after three weeks of minimal use, and even at a slow speed of 20–30km per hour and had the disturbing noise, the cause of which could not be identified or repaired for more than four months, it was justifiable that the plaintiff be allowed to reject the goods and get full refund of all that the plaintiff had paid for the car (see para 20).

[Bahasa Malaysia summary

Plaintif telah membeli kereta Mercedes Benz C200 daripada defendan pada harga RM80,000. Selepas menerima kereta daripada defendan, plaintif mendapati kereta mengandungi kecacatan di mana terdapat bunyi luar biasa dan/atau getaran daripada bahagian hadapan kanan kereta walaupun dia membawa pada kelajuan yang rendah. Plaintif hanya boleh menggunakan kereta tersebut untuk selama tiga minggu sebelum ia dihantar balik kepada pusat servis defendan. Defendan, sehingga hari ini, masih belum dapat mengenal pasti punca bunyi tersebut. Setiap masa plaintif memohon maklum balas daripada defendan, defendan akan memaklumkan kepadanya yang mereka masih mengenal pasti masalah dan bahagian asal telah digantikan dan tiada butiran yang diberikan kepada plaintif. Plaintif kemudiannya memulakan permohonan ini di bawah A 14 k 1 Kaedah-Kaedah Mahkamah 2012 ('KKM') memohon untuk, antara lain, pemulangan kereta tersebut; dan bayaran sebanyak RM191,690.97 bersama caj-caj sebanyak 2.42% setahun berjumlah sebanyak RM33,880 dan faedah sebanyak 4.55% sebagai caj bank dan apa-apa bayaran dan/atau penalti yang akan dikenakan oleh bank terhadap plaintif. Defendan berhujah bahawa dengan memulakan tindakan writ ini, plaintif telah mengakui bahawa perkara ini mesti dibicarakan melalui keterangan *viva voce*.

Diputuskan:

(1) Dalam memohon relief yang mana, antara lain, termasuk perintah perisytiharan, plaintif adalah bebas untuk memutuskan sama ada untuk memulakan tindakan melalui saman pemula atau melalui writ saman. Mahkamah mempunyai kuasa untuk membenarkan permohonan plaintif untuk penghakiman terus di dalam kes yang jelas dan biasa di mana defendan tidak mempunyai pembelaan terhadap tuntutan plaintif. Adalah jelas bahawa pembelaan tidak dapat dipertahankan dan tidak terdapat isu yang boleh dibicarakan dibangkitkan. Demi kepentingan keadilan, penghakiman terus patut diberikan kepada plaintif tanpa keperluan untuk bicara keterangan *viva voce* penuh (lihat perenggan 10–11 & 21).

(2) Plaintif tidak perlu menunggu sehingga kereta tersebut tidak boleh digunakan sepenuhnya dan menjadi musnah sepenuhnya sebelum

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plaintif berhak menolak kereta tersebut. Fakta bahawa kereta tersebut adalah kereta premium, telah dibaiki di pusat servis defendan selepas tiga minggu penggunaan minima, dan walaupun pada kelajuan rendah 20–30km sejam mempunyai bunyi yang menggangu, punca yang tidak dapat dikenal pasti atau dibaiki lebih dari empat bulan, adalah wajar untuk plaintif dibenarkan menolak barang tersebut dan mendapat bayaran balik sepenuhnya untuk kesemua yang telah dibayar oleh plaintif bagi kereta tersebut (lihat perenggan 20).]

Notes

For cases on declaration, see 2(3) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 6049–6053.

Cases referred to

Bank Negara Malaysia v Mohd Ismail & Ors [1992] 1 MLJ 400, SC (refd)
Chen Heng Ping & Ors v Intradagang Merchant Bankers (M) Bhd [1995] 2 MLJ 363, CA (refd)
Puncak Niaga (M) Sdn Bhd v NZ Wheels Sdn Bhd [2012] 1 MLJ 27; [2011] 9 CLJ 833, CA (refd)
United Malayan Banking Corporation Berhad v Palm & Vegetable Oils (M) Sdn Bhd [1983] 1 MLJ 206; [1982] CLJ 547, FC (refd)
United Merchant Finance Bhd v Majlis Agama Islam Negeri Johor [1999] 1 MLJ 657; [1999] 2 CLJ 151, FC (refd)

Legislation referred to

Consumer Protection Act 1999 s 45
Rules of Court 2012 O 14 r 1

CM Tan (Joseph Ting & Co) for the plaintiff.
JL Foo (Gan Partnership) for the defendant.

Yeoh Wee Siam J:

[1] This is my judgment regarding encl 7.

BACKGROUND FACTS

[2] The plaintiff had purchased a Mercedes-Benz C200 at the total value of RM281,427.82 (plus another Cobra Connex T5X worth RM4,800) from the defendant and paid over RM80,000 to the defendant (exh SPY10 of the plaintiff's affidavit in support ('the AIS')).

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[3] The defendant on 25 April 2012 delivered a car with the plate No WWM 9696 ('the car') to the plaintiff (exhs SPY4 and SPY5 of the plaintiff's AIS).

[4] Subsequently, the plaintiff discovered that the car contains defects where there was an unusual noise and/or vibration from the front right part of the car near the tyre of the car, even when she was driving at a slow speed.

[5] The plaintiff was only able to use the car for three weeks before it was sent back to the defendant's service centre. The defendant, as at to date, is still unable to identify the cause of the noise/vibration.

[6] Everytime the plaintiff requested feedback from the defendant, the plaintiff would be informed that that 'the Defendant was still identifying the problems and original parts were replaced'. No detail was provided to the plaintiff.

[7] As at to date, the car is still in the defendant's possession.

ENCLOSURE 7

[8] This is the plaintiff's application under O 14 r 1 of the Rules of Court 2012 ('the ROC') for the following reliefs:

25

(a) Deklarasi bahawa Hap Seng Star Sdn. Bhd (No. Syarikat: 659844-H) (Selepas ini dirujuk sebagai 'Defendan tersebut') perlu mengambil balik kereta no. plat WWM 9696 dengan no. enjin 27186030412835 dan no casis WDD2040486L055638 (Selepas ini dirujuk sebagai 'Kereta tersebut') yang dijual Defendan dan telah berada dalam simpanan Defendan sejak 13.05.2012.

(b) Pembayaran RM191,690.97 bersama dengan caj terma sebanyak 2.42% setahun berjumlah kepada RM33,880.00 dan faedah 4.55% setahun sebagai caj bank dan apa-apa bayaran dan/atau penalti yang akan dikenakan oleh bank pembiaya terhadap Plaintif;

(c) Distres mental dan/atau kesusahan yang dialami Plaintif sebanyak RM15,000.00.

(d) Kos guaman dan perbelanjaan Plaintif yang dibelanjakan sebanyak RM15,000.00.

(e) Kehilangan kegunaan kereta tersebut bermula 13.05.2012 pada harga RM150.00 sehari;

(f) Faedah 5% dalam kiraan harian ke atas jumlah perlu dibayar dari tarikh pemfailan Writ saman sehingga tarikh penghakiman;

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(g) Faedah 5% dalam kiraan harian ke atas jumlah perlu dibayar dari tarikh penghakiman sehingga tarikh penyelesaian penuh;

(h) Kos; dan

(i) Sebarang relif lain yang Mahkamah Mulia ini anggap sesuai dan munasabah.

THE COURT'S DECISION REGARDING ENCL 7 GIVEN ON 29 JANUARY 2013

[9] The plaintiff's application is allowed as follows:

Prayers 25(a) and (b)	:	Allowed.
Prayer 25(c)	:	RM2,000 allowed.
Prayer 25(d)	:	Not allowed (in view of prayer 25(h)).
Prayer 25(e)	:	Not allowed (since the plaintiff was given a replacement car to use).
Prayers 25(f) and (g)	:	Allowed.
Prayer 25(h)	:	Costs of RM4,000 allowed

GROUNDS FOR THE COURT'S DECISION

[10] By way of a preliminary point, I am of the view that in seeking a relief which, inter alia, includes a declaratory order, the plaintiff is at liberty to decide whether to commence this action by an originating summons or by a writ of summons. I do not agree with the submission of counsel for the defendant that by commencing this writ action, the plaintiff has conceded that this is a matter which must be tried through viva voce evidence.

[11] The court has the power to grant the plaintiff's application for summary judgment in a plain and obvious case where the defendant has no defence to the plaintiff's claim (see *Bank Negara Malaysia v Mohd Ismail & Ors* [1992] 1 MLJ 400, *Chen Heng Ping & Ors v Intradagang Merchant Bankers (M) Bhd* [1995] 2 MLJ 363, *United Malayan Banking Corporation Berhad v Palm & Vegetable Oils (M) Sdn Bhd* [1983] 1 MLJ 206; [1982] CLJ 547 and *United Merchant Finance Bhd v Majlis Agama Islam Negeri Johor* [1999] 1 MLJ 657; [1999] 2 CLJ 151).

[12] The facts show the following:

(a) The plaintiff issued letters to the defendant and rejected the goods/car (exhs SPY6 and SPY8 of the AIS) when after one month the defendant was still not able to identify the problems to the car.

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In the defendant's email dated 10 September 2012, ie four months after the car was in the defendant's service centre, the defendant admitted that they have no solution to resolve the knocking noise of the car (exh SPY7 of the AIS);

(b) five months after the car was in the defendant's service centre, and after the plaintiff had commenced these proceedings against the defendant, the defendant requested the plaintiff to take back the car without confirming whether the car was in a good and merchantable condition (exh TCH3 of the defendant's affidavit in reply). The plaintiff then requested the defendant to confirm whether the car was duly repaired and/or safe. The defendant never responded to the plaintiff's query (exh SPY13 of the plaintiff's second affidavit in reply);

(c) the defendant's expert report in October 2012 stated:

> Noise appears on the front right side of the vehicle and could be heard in the interior during the test drive;
>
> Cure-No Remedy Found;
>
> Noise still persist despite installing standard & NVH Damper (A2043204830) shock absorbers;
>
> Current Status: Noise still persist to the current date with the standard & NVH Damper (A2043204830) shock absorbers;
>
> Follow Up — ... Noise complaints is not known from other SEA CKD and CBU markets' (exh SPY11 of the plaintiff's affidavit in reply);

(d) when the plaintiff first took delivery of the car from the defendant, the mileage of the car was 373.3km (para 9 of the plaintiff's AIS). As at October 2012, the mileage of the car was more then 1,700km (exh SPY11 of the plaintiff's affidavit in reply); and

(f) the plaintiff is a director of a company. The plaintiff does not wish to drive a car which has a rattling/knocking/vibrating sound when it is a Mercedes C200 worth about RM300,000.

[13] The defendant contended that the question whether the car is defective is a question of fact and it cannot be resolved by affidavit evidence. Moreover, on the question whether the alleged defect is so serious that it warrants a new car to be given to the plaintiff is a matter that has to be established on facts, which can only be available at the trial. The defendant further contended that the various technicians who inspected the car had given it a clean bill of health.

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If the plaintiff seeks to establish otherwise, then the plaintiff has to produce her own experts, or prove it through cross-examination of the defendant's technicians. The defendant argued that the plaintiff did not produce any independent report of her own certifying or confirming the vehicle to be defective.

[14] I do not think that a full trial is necessary. The facts, documents and exhibits of both parties are clear in establishing that the plaintiff could only use the brand new car for about three weeks. Even with driving at a slow speed of 20–30km per hour, the noise complained of could still be heard. It is unthinkable that the defendant expects the plaintiff to take back the car if it fails to reply to the plaintiff's request for confirmation that the car has been duly repaired and is safe.

[15] Section 45 of the Consumer Protection Act 1999 provides:

> Manner of rejecting goods
>
> 45(1) The consumer shall exercise the right conferred under this Act to reject the goods by notifying the supplier of the decision to reject the goods and of the ground or grounds for the rejection.

[16] In the defendant's e-mail dated 10 September 2012, four months after the car was in the defendant's service centre, the defendant admitted that they have no solution to resolve the knocking noise of the car:

> ... We have still not received any proposed solution from DAG to solve the front knocking noise encountered by the vehicle. He has then agreed to replace the vehicle (exh SPY7 of the plaintiff's AIS).

[17] The plaintiff is entitled to reject the goods ie the car if it is not of merchantable quality.

[18] The plaintiff relied on the following Court of Appeal decision in *Puncak Niaga (M) Sdn Bhd v NZ Wheels Sdn Bhd* [2012] 1 MLJ 27; [2011] 9 CLJ 833 where it was held:

> (1) ... The respondent had breached the implied conditions and/or guarantees under the Act and the appellant was entitled to reject the car.
>
> (2) The appellant had rejected the car when it was left at the respondent's workshop on 21 May 2007. Leaving the car at the workshop without taking it back constituted notification of the rejection.
>
> (3) The facts were clear and undisputed and there were no triable issues. The defence of the respondent was totally misconceived and had no merit, (paras 38 & 55).

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(4) All the documents in the case showed the car had defects and no further facts were needed to be introduced by way of trial to throw light on the documents. There were no circumstances that required to be investigated. Consequently, there was no good reason to go to trial.

[19] Counsel for the defendant attempted to distinguish the above case on the ground that in *Puncak Niaga* there were seven instances that the car could not start over a period of one year and the car was in the workshop for 128 days and there were six breakdowns of the car. He submitted that the car in the present case is not totally incapacitated.

[20] With respect, I do not think that the plaintiff has to wait for the car to be totally incapacitated and be a total write-off before the plaintiff is entitled to reject the car. By the very fact that the car, a premium car, has to go into the defendant's service centre after three weeks of minimal use, and even at a slow speed of 20–30km per hour, and has the disturbing noise, the cause of which could not be identified or repaired for more than four months, it is justifiable that the plaintiff be allowed to reject the goods, and get a full refund of all that the plaintiff has paid for the car.

[21] It is clear that the defence is not sustainable and there are no triable issues raised. Since this is a plain and obvious case, I decided that in the interest of justice, summary judgment ought to be given to the plaintiff without the necessity of a full trial for viva voce evidence.

[22] Based on the foregoing grounds, I therefore ordered accordingly.

Order accordingly.

Reported by Afiq Mohamad Noor